Attorney General of Malaysia v Sabah Law Society (State Government of Sabah, intervenor)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01(IM)-889–12 OF 2022
RAVINTHRAN, MOHD NAZLAN AND CHOO KAH SING JJCA
18 JUNE 2023

Civil Procedure — Judicial review — Application for leave — Locus standi — Adversely affected test — Justiciability — Application for leave to commence judicial review application against Federal Government's omission in exercising review power under art 112D of Federal Constitution — High Court allowed application for leave — Whether 'omission' was 'decision' in accordance with O 53 r 2(4) of Rules of Court 2012 — Whether judicial review application was public interest litigation — Whether applicant had established threshold locus standi — Whether subject matter of judicial review application justiciable — Whether application for leave to commence judicial review application ought to be allowed — Rules of Court 2012 O 53

This was an appeal by the Attorney General ('the appellant') against the decision of the High Court under O 53 of the Rules of Court 2012 ('the ROC') in allowing the application by Sabah Law Society ('the SLS') for leave to commence judicial review application against the Federal Government ('the leave application'). In gist, the SLS argued that the judicial review application was only aimed at compelling the Federal Government to perform its constitutional duty under arts 112C, 112D and the Tenth Schedule of the Federal Constitution ('the Constitution'), ie, the failure to conduct a review during the period from 1974 to 2021 ('the Lost Years') pursuant to art 112D of the Constitution and to pay Sabah's 40% entitlement for the annual payments for the said period, as there was omission of the duty in 'the Federal Constitution (Review of the Special Grant under Article 112D (State of Sabah) Order 2022 PU(A) 119/2022' ('the Review Order 2022'). The High Court allowed the leave application based on the following findings: (a) the threshold for a leave application to commence judicial review was met by the SLS; (b) the argument that the SLS had no locus standi was dismissed; and (c) in respect of the argument that the subject matter was non-justiciable, the learned High Court judge found that SLS was not asking the court to review the contents of the Review Order 2022, rather, SLS was seeking redress for breach of a constitutional duty owed to Sabah under the Constitution, and this issue could not be determined at the leave stage but should be argued at the substantive stage. Dissatisfied with the High Court's decision, the appellant filed the present appeal. The two main issues raised in the present appeal were in relation to locus standi and justiciability of the subject matter of the judicial review

A application ('justiciability issue'). As regards locus standi, the appellant argued that: (i) in the present case, there was no 'decision' pursuant to O 53 r 2(4) of the ROC, as such, the SLS had no locus standi to commence judicial review; and (ii) the SLS failed the 'adversely affected' test for locus standi — in this regard, the appellant submitted that the SLS had no personal interest over the B Special Grant mentioned under art 112C of the Constitution and the present case was not a public interest litigation. The parties relied on three eminent authorities in relation to the test for locus standi, ie, *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164, *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ C 145, and *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829;; [2023] 5 CLJ 167 ('the trio of cases'). With respect to the issue of justiciability, the appellant submitted that the matter was not suited for judicial determination because the determination of D the matter involved non-legal considerations.

Held, dismissing the appeal and directing the High Court to fix a date for the full hearing of the judicial review application with no order as to costs:

E (1) The law was settled that the burden that an applicant must discharge to obtain leave was low regardless of the fact whether the application was heard inter parte or ex parte. The leave application was essentially a filter to weed out frivolous or wholly unmeritorious applications. Leave was normally granted when the application was found not to be frivolous and justified argument in a full hearing. However, there were case authorities F which held that leave may be refused if the applicant had no locus standi or the subject matter of the judicial review application was non-justiciable (see paras 13 & 17).

(2) The argument of the SLS was that the Review Order 2022 purported to G be an exercise of the review power under art 112D but no mention was made of the so-called 'Lost Years'. Whether there was merit in this argument or not, should be addressed in the substantive hearing. Be that as it may, prima facie, it could not be said that Review Order 2022 was not a 'decision' within the meaning of O 53 r 2(4) of the ROC. An H 'omission' was also a decision under the said provision. In the present case, there was in existence Review Order 2022 that purportedly did not account for the so-called 'Lost Years' and was therefore arguably 'an omission' that could come within the ambit of a decision (see paras 26 & 28).

I (3) The court found that the SLS had at the very least established threshold locus standi. The present judicial review application, based on the discussion in the trio of cases, was clearly a public interest litigation taken for the benefit of a section of the public. It was not taken to seek redress for a personal wrong or grievance of the SLS. Further, the issue sought to

be addressed in the judicial review application involved a matter of high constitutional importance. It was taken to purportedly vindicate a constitutional right accorded to the State of Sabah and therefore by extension, for the benefit of the people of Sabah. Whether there was merit in this application or otherwise, was a matter that should be addressed in the full hearing. It may well be that at the end of the full hearing, the High Court may review the finding of threshold locus standi and may not grant relief on substantive examination of the matter. However, to shut out SLS from ventilating the issue on the ground of locus standi at this stage would definitely be a retrograde step and would not be consonant with the recent development of the law in this area. In the premises, the court found no merit in the appellant's argument on locus standi (see paras 43–44).

(4) The court opined that at this stage, it could not be said that the subject matter of the judicial review application was not justiciable. The counsel for the SLS pointed out that the SLS was not challenging the lawfulness of the Special Grant, neither was the SLS asking the court to conduct a review under art 112D of the Constitution. Such prayers would attract the justiciability argument. Instead, the overarching focus of the judicial review application, was the alleged omission in the Review Order 2022 to account for the missing 'Lost Years'. In this regard, the court agreed with the learned High Court judge that this was a matter of interpretation to be decided in a full hearing. For the above reasons, the court was not persuaded that the matter was prima facie not justiciable (see paras 50–51).

[Bahasa Malaysia summary

Ini adalah rayuan oleh Peguam Negara ('perayu') terhadap keputusan Mahkamah Tinggi di bawah A 53 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dalam membenarkan permohonan oleh Sabah Law Society ('SLS') bagi mendapatkan kebenaran untuk memulakan permohonan semakan kehakiman terhadap Kerajaan Persekutuan ('permohonan kebenaran'). Pada dasarnya, SLS berhujah bahawa permohonan semakan kehakiman tersebut hanya bertujuan untuk memaksa Kerajaan Persekutuan melaksanakan kewajipan perlembagaannya di bawah perkara 112C, 112D dan Jadual Kesepuluh Perlembagaan Persekutuan ('Perlembagaan'), iaitu kegagalan untuk menjalankan kajian semula dalam tempoh dari 1974 hingga 2021 ('Tahun-Tahun Yang Hilang') menurut perkara 112D Perlembagaan dan untuk membayar 40% hak Sabah untuk bayaran tahunan bagi tempoh tersebut, kerana terdapat peninggalan kewajipan tersebut dalam 'Perintah Perlembagaan Persekutuan (Kajian Semula Pemberian Khas di bawah Perkara 112D (Negeri Sabah) 2022 PU(A) 119/2022' ('Perintah Kajian Semula 2022'). Mahkamah Tinggi membenarkan permohonan kebenaran tersebut berdasarkan dapatan-dapatan berikut: (a) ambang untuk permohonan

kebenaran untuk memulakan semakan kehakiman telah dipenuhi oleh SLS; (b) hujah bahawa SLS tidak mempunyai locus standi telah ditolak; dan (c) berkenaan dengan hujah bahawa perkara utama bagi permohonan tersebut tidak boleh diadili, hakim Mahkamah Tinggi yang arif mendapati bahawa SLS tidak meminta mahkamah untuk menyemak kandungan Perintah Kajian Semula 2022, sebaliknya, SLS ingin mendapatkan ganti rugi untuk pelanggaran kewajipan perlembagaan yang terhutang kepada Sabah di bawah Perlembagaan, dan isu ini tidak dapat ditentukan pada peringkat kebenaran tetapi harus dihujahkan pada peringkat substantif. Tidak berpuas hati dengan keputusan Mahkamah Tinggi, perayu memfailkan rayuan semasa. Dua isu utama yang dibangkitkan dalam rayuan ini adalah berkaitan locus standi dan sama ada perkara utama bagi permohonan semakan kehakiman boleh diadili ('isu kebolehadilan'). Berkenaan locus standi, perayu berhujah bahawa: (i) dalam kes ini, tiada 'keputusan' menurut A 53 k 2(4) KKM 2012, oleh itu, SLS tidak mempunyai locus standi untuk memulakan semakan kehakiman; dan (ii) SLS gagal dalam ujian 'adversely affected' untuk locus standi — dalam hal ini, perayu berhujah bahawa SLS tidak mempunyai kepentingan peribadi ke atas Pemberian Khas yang disebut di bawah perkara 112C Perlembagaan dan kes semasa bukan litigasi berkepentingan awam. Pihak-pihak tersebut bergantung kepada tiga autoriti terkemuka berhubung dengan ujian locus standi, iaitu, *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164, *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145, dan *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829;; [2023] 5 CLJ 167 ('tiga kes tersebut'). Berkenaan dengan isu kebolehadilan, perayu berhujah bahawa perkara tersebut tidak sesuai untuk penentuan kehakiman kerana penentuan perkara tersebut melibatkan pertimbangan bukan undang-undang.

Diputuskan, menolak rayuan dan mengarahkan Mahkamah Tinggi menetapkan tarikh pendengaran penuh permohonan semakan kehakiman tanpa perintah mengenai kos:

(1) Sudah menjadi undang-undang yang mantap bahawa beban yang perlu dilepaskan oleh pemohon untuk mendapatkan kebenaran adalah rendah tanpa mengira hakikat sama ada permohonan tersebut didengar secara inter parte atau ex parte. Permohonan kebenaran pada asasnya adalah penapis untuk mengasingkan permohonan yang remeh atau tidak patut. Kebenaran biasanya diberikan apabila permohonan tersebut didapati tidak remeh dan wajar dihujahkan dalam pendengaran penuh. Walau bagaimanapun, terdapat autoriti-autoriti kes yang berpendapat bahawa kebenaran boleh ditolak jika pemohon tidak mempunyai locus standi atau perkara utama permohonan semakan kehakiman adalah tidak boleh diadili (lihat perenggan 13 & 17).

(2) Hujah SLS adalah bahawa Perintah Kajian Semula 2022 dikatakan

sebagai pelaksanaan kuasa kajian semula di bawah perkara 112D tetapi di dalamnya tidak disebut tentang apa yang dipanggil sebagai 'Tahun-Tahun Yang Hilang' tersebut. Sama ada terdapat merit dalam hujah ini atau tidak, harus ditangani dalam pendengaran substantif. Walau apa pun, secara prima facie, tidak boleh dikatakan bahawa Perintah Kajian Semula 2022 tersebut bukanlah 'keputusan' dalam pengertian A 53 k 2(4) KKM 2012. 'Peninggalan' juga merupakan keputusan di bawah peruntukan tersebut. Dalam kes ini, wujud Perintah Kajian Semula 2022 yang didakwa tidak mengambil kira apa yang dipanggil sebagai 'Tahun-Tahun Yang Hilang' dan oleh itu boleh dikatakan merupakan 'peninggalan' yang boleh termasuk dalam apa yang dikatakan sebagai keputusan (lihat perenggan 26 & 28).

(3) Mahkamah mendapati bahawa SLS sekurang-kurangnya telah membuktikan locus standi ambang yang ditetapkan. Permohonan semakan kehakiman semasa, berdasarkan perbincangan dalam tiga kes tersebut, jelas merupakan litigasi berkepentingan awam yang dibuat untuk manfaat sebahagian orang awam. Ia tidak dibuat untuk mendapatkan ganti rugi bagi kesalahan atau rungutan peribadi SLS. Seterusnya, isu yang ingin ditangani dalam permohonan semakan kehakiman tersebut melibatkan perkara yang mempunyai kepentingan perlembagaan yang tinggi. Ia dikatakan diambil untuk membuktikan hak perlembagaan yang diberikan kepada Negeri Sabah dan oleh itu secara lanjutan, untuk kepentingan rakyat Sabah. Sama ada terdapat merit dalam permohonan ini atau sebaliknya, adalah perkara yang harus ditangani dalam pendengaran penuh. Mungkin pada akhir perbicaraan penuh, Mahkamah Tinggi akan menyemak dapatan locus standi ambang dan tidak memberikan relif setelah menjalankan pemeriksaan substantif perkara tersebut. Walau bagaimanapun, untuk menghalang SLS daripada membangkitkan isu tersebut atas alasan locus standi pada peringkat ini pastinya akan menjadi suatu langkah mundur dan tidak akan selaras dengan perkembangan terbaru undang-undang dalam bidang ini. Atas alasan-alasan tersebut, mahkamah mendapati tiada merit dalam hujahan perayu mengenai locus standi (lihat perenggan 43–44).

(4) Mahkamah berpendapat bahawa pada peringkat ini, tidak boleh dikatakan bahawa perkara utama permohonan semakan kehakiman adalah tidak boleh diadili. Peguam untuk SLS menegaskan bahawa SLS tidak mencabar keabsahan Pemberian Khas tersebut, SLS juga tidak meminta mahkamah menjalankan kajian semula di bawah perkara 112D Perlembagaan. Permohonan-permohonan sedemikian akan menarik hujah kebolehadilan. Sebaliknya, tumpuan menyeluruh permohonan semakan kehakiman tersebut adalah dakwaan peninggalan dalam Perintah Kajian Semula 2022 untuk mengambil kira 'Tahun-Tahun Yang Hilang' tersebut. Sehubungan itu, mahkamah bersetuju dengan hakim Mahkamah Tinggi yang arif bahawa ini adalah persoalan tafsiran yang

perlu diputuskan dalam perbicaraan penuh. Atas sebab-sebab di atas, mahkamah tidak diyakinkan bahawa perkara tersebut adalah prima facie tidak boleh diadili (lihat perenggan 50–51).]

Cases referred to

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228, SC (refd)

Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829; [2023] 5 CLJ 167, FC (refd)

Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298, HC (refd)

Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (refd)

Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang [1988] 2 MLJ 12; [1988] 1 CLJ 219, SC (refd)

Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd [on appeal from Reg v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd] [1982] AC 617, HL (refd)

Karpal Singh Ram Singh v Ketua Hakim Negara [2011] 4 CLJ 179, HC (refd)

Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd [2017] 2 MLJ 197, CA (refd)

M & W Zander (M) Sdn Bhd v Director General of Inland Revenue [2005] MLJU 669, HC (refd)

Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145, FC (refd)

Malik Brothers v Narendra Dadhich and others AIR 1999 SC 3211; (2000) 1 MLJ 67 (SC), SC (refd)

QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164, CA (refd)

Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346; [1987] 2 CLJ 199, SC (refd)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo [2014] 6 MLJ 812, FC (refd)

Legislation referred to

Advocates Ordinance (Cap 2) s 13A

Federal Constitution arts 112C, 112C(1)(a), 112D, 112D(2), (3), (4), (6), Tenth Schedule, Part IV, s 2

Rules of Court 2012 O 53, O 53 rr 2(4), 3(3)

Rules of High Court 1980 (repealed by Rules of Court 2012) O 53

Appeal from: *Sabah Law Society v The Government of The Federation & Anor* [2023] MLJU 2053 (High Court, Kota Kinabalu)

Shamsul Bolhassan (with Ahmad Hanir bin Hambaly @ Arwi and Krishna Priya a/p Veenagopal @ Venugopa) (Attorney General's Chambers) for the appellant.
David Fung Yin Kee (with Jeyan Marimuttu and Janice Junie Lim) (J Marimuttu & Partners) for the respondent.
Brenndon Keith Soh and Nor Asiah bt Mohd Yusof (Sabah State Attorney General's Chambers) for the intervenor.

Ravinthran JCA:

INTRODUCTION

[1] The appeal before us is by the Federal Attorney General ('AG') against the decision of the High Court under O 53 of the Rules of Court 2012 to grant leave to commence a judicial review application. The applicant is the Sabah Law Society ('SLS') which is a body set up under the Sabah Advocate Ordinance (Sabah Cap 2). The putative respondent in the judicial review leave application is the Federal Government (intituled as the Government of the Federation of Malaysia). The AG was served with the judicial review leave application not in his capacity as respondent but because O 53 r 3(3) of the Rules of Court 2012 requires it. However, at the outset, the State Government of Sabah, through its then counsel who is a private practitioner, applied successfully to intervene as a party. Consequently, the Sabah Government was added as the second respondent. Thus, both the senior federal counsel ('SFC') who represented the AG and counsel for the Sabah Government appeared at the judicial review leave hearing in the High Court and presented arguments.

[2] Leave was granted by the High Court to commence judicial review application. The AG, who had objected to the leave application, filed the instant appeal against the decision of the High Court. The Sabah Government, whose then counsel urged the High Court to dismiss the leave application 'insofar as the same seeks substantive review of the contents of the 1970 and 2022 Orders', did not file any appeal.

[3] However, just weeks before this appeal came up for hearing, counsel for the Sabah Government, filed an application to intervene in this appeal. Counsel for the SLS objected to the application on the ground that the Sabah Government chose not to appeal the decision of the High Court to grant leave for its judicial review application. We allowed the application as, notwithstanding the fact that no appeal was mounted against the decision to grant leave, the Sabah Government obviously has an interest in the outcome of this appeal by the AG.

[4] Learned counsel for the Sabah Government presented lengthy written and oral submissions arguing that the SLS has no locus standi and that the matter at hand is non-justiciable. However, shortly after the conclusion of the instant appeal hearing before us, at a case management hearing before the deputy registrar to fix a decision date, the Sabah Attorney General ('SAG') appeared in person and informed the court that the appointment of the private practitioner as counsel for the Sabah Government had been revoked. The deputy registrar was also informed that the SAG is withdrawing all arguments made by the said counsel before us. A letter to that effect was also sent to the court registry. When we reconvened to deliver decision this morning, the SAG also appeared before us and gave oral confirmation of the same. The SAG was also content with the matter proceeding to the substantive hearing stage and be ventilated on its merits. As we are not *functus officio*, we shall accordingly disregard the arguments canvassed before us by the previous counsel for the Sabah Government.

THE JUDICIAL REVIEW LEAVE APPLICATION

[5] The judicial review application has to do with the special grant provided for Sabah under art 112C and s 2 of Part IV of the Tenth Schedule of the Federal Constitution. The special grant was something that was agreed to by all the parties when Sabah, Sarawak and Singapore formed Malaysia by signing the Malaysia Agreement 1963 on 9 July 1963 with the Federation of Malaysia and United Kingdom. The special grant is subject to review under art 112D. For sake of convenience, we set out the relevant provisions of the Federal Constitution below. Article 112C(1)(a) provides as follows:

> 112C Special grants and assignment of revenue to States of Sabah and Sarawak
>
> (1) Subject to the provisions of Article 112D and to any limitation expressed in the relevant section of the Tenth Schedule —
>
> (a) the Federation shall make to the States of Sabah and Sarawak in respect of each financial year the grants specified in Part IV of that Schedule;

[6] In s 2 of Part IV of the Tenth Schedule referred to above, the special grant is expressed as follows:

> 2(1) In the case of Sabah, a grant of amount equal in each year *to two-fifths of the amount by which the net revenue* derived by the Federation from Sabah exceeds the net revenue which would have been so derived in the year 1963 if —
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> (a) the Malaysia Act had been in operation in that year as in the year 1964; and
>
> (b) the net revenue for the year 1963 were calculated without regard to any alteration of any tax or fee made on or after Malaysia Day,

('net revenue' meaning for this purpose the revenue which accrues to the Federation, less the amounts received by the State in respect of assignments of that revenue). (Emphasis added.)

[7] The 'two-fifths of the amount of revenue' referred to in the above provision is referred to by counsel for the SLS as Sabah's 40% entitlement. The special grants to Sabah and Sarawak are subject to review under art 112D by the Government of the Federation and the Governments of Sabah and Sarawak. Of relevance to the instant judicial review application is the interval period between the constitutionally mandated reviews. Clauses (3) and (4) of art 112D provide as follows:

(3) The period for which provision is to be made on a review shall be a period of five years or (except in the case of the first review) such longer period as may be agreed between the Federation and the States or State concerned; but any order under Clause (1) giving effect to the results of a review shall continue in force after the end of that period, except in so far as it is superseded by a further order under that Clause.

(4) A review under this Article shall not take place earlier than is reasonably necessary to secure that effect can be given to the results of the review from the end of the year 1968 or, in the case of a second or subsequent review, from the end of the period provided for by the preceding review; but, subject to that, reviews shall be held as regards both the States of Sabah and Sarawak for *periods beginning with the year 1969 and with the year 1974*, and thereafter as regards either of them at such time (during or after the period provided for on the preceding review) as the Government of the Federation or of the State may require. (Emphasis added.)

[8] The complaint of the applicant is that the second review to pay the 40% entitlement was not made by the end of 1974 in accordance with the clause. However, on 20 April 2022, the Federal Government published an order in the gazette under the authority of art 112D. It is titled 'The Federal Constitution (Review of the Special Grant under art 112D (State of Sabah) Order 2022 PU (A)119/2022) ('the Review Order 2022'). Shorn of the citation and preamble, the Review Order 2022 reads as follows:

2. For a period of five years with effect from 1 January 2022, the Government of the Federation shall make to the State of Sabah, in respect of the financial year 2022, 2023, 2024, 2025 and 2026, grants in the amount of RM125.6 million, RM129.7 million, RM133.8 million, RM138.1 million and RM142.6 million respectively.

3. The Sabah Special Grant (First Review) Order, 1970 [P.U. (A) 328/1970] is revoked.

[9] Thus, according to counsel for SLS, after having failed to conduct a review by the end of 1974, the federal government allegedly 'failed to remedy Sabah's 40% entitlement for the annual payments for the period from 1974 to 2021 in its decision, action and omission under the Review Order 2022'. The

A period between 1974 and 2021 is referred to by counsel for SLS as the 'Lost Years'. It was argued in the High Court and before us that the said failure is a breach of the Federal Government's constitutional duty towards Sabah. This argument is supported by paras 46 and 47 of affidavit verifying facts deposed on 9 June 2022 by Roger Chin Ken Fong who was the then President of the Sabah Law Society. The said paragraphs read as follows:

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> 46. There seems to have been a First Review under Article 112D for Sabah — P.U.(A) 328/1970 dated August 18, 1970.
>
> The Federal Government and Sabah Government agreed that instead of the 40 percent grant (40%), another grant be made as follows:
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> C
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> i. 1969 – RM20 million
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> ii. 1970 – RM21.5 million
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> iii. 1971 – RM23.1 million
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> D
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> iv. 1972 – RM24.8 million
>
> v. 1973 – RM26.7 million
>
> The period of this new grant was specifically stated to be from 1.1.1969 to 1.1.1974 (Sabah Special Grant [First Review] Order 1970).
>
> E
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> 47. Further to paragraph 46 above, the Review undertaken under Article 112D (3) was for a period of 5 years for the years 1969 to 1973. In the absence of any further reviews covering the period 1974 to the present, the 40 per cent Special Grand provided in them 2(1) of Part IV, would be applicable until such time as a further review is conducted and implemented.
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> F
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> It is also to be noted under Article 112D (4), any review may only take place from the end of the year 1969. Accordingly, for the period from 1964 to 1969 the 40% Formula would apply as it would for the period from 1974 to 2021 or until further review. This is particularly so when the Federal Government had failed and or neglected to hold such a review in accordance with Article 112D (4).
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> G

[10] For sake of completeness, we shall also reproduce below para 37 of the affidavit in opposition of Mohd Sofian Alfian Nair, the permanent secretary of the Ministry of Finance of Sabah who responded to the above averments:

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> 37. Paragraphs 46 and 47 are denied. I am advised and aver the grant contained in the 1970 Order was a substituted grant pursuant to Article 112D (1), and not the Sabah Special Grant. The 1970 Order did not permanently alter or abolish the special grant contained in Part IV of the Tenth Schedule.

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[11] Counsel for the SLS was at pains to point out that the judicial review action seeking certiorari, declaration and mandamus is only aimed at compelling the Federal Government to perform its constitutional duty under arts 112C, 112D and the Tenth Schedule of the Federal Constitution, ie the failure to conduct a review during the so-called 'Lost Years' and pay the 40%

entitlement as there is omission of it in the Review Order 2022. It is not sought to ask the court to conduct a judicial review that touches on the merits of the review conducted under art 112D.

[12] For ease of reference, we shall now reproduce the relevant paragraphs in relation to the remedies sought in the judicial review leave application below:

1. That the Applicant be granted leave to apply for an order of certiorari to remove into the High Court for the purpose of quashing such part of the decision contained in Gazette publication P.U. (A) 119/2022 dated 20.4.2022 as is or is implied to decide and publish that the duty of the Respondent is otherwise than is as declared under paragraphs 2 (a) and 2 (b) herein.

2. A declaration that:

   (a) That the failure of the Respondent to hold the second review in the year 1974 with the State Government of Sabah is a breach and contravention of its constitutional duty stipulated under Article 112D, Clauses (1), (3) and (4) of the Federal Constitution.

   (b) That the 40% entitlement under Article 112C read with subsection (1) of section 2 of Part IV of the Tenth Schedule of the Federal Constitution means an annual special grant of two-fifths of the amount by which the net revenue derived by the Respondent from the State of Sabah exceeds the net revenue which would have been derived in the year 1963 wherein net revenue is the revenue which accrues to the Federation less the amounts received by the State of Sabah in respect of assignments of that revenue under Part III and V of the Tenth Schedule of the Federal Constitution as depicted by the formula as shown:

   Federal Revenue derived from Sabah in current Year — A

   Revenue Assigned to State [Part III and V 10th Schedule] — B

   Net Revenue derived from Sabah in current Year [A – B = C] — C

   Federal Revenue derived from Sabah in 1963 — D

   Revenue assigned to Sabah in 1963 — E

   Net Revenue derived from Sabah in 1963 [D – E = F] — F

   Special Grant due to Sabah in Current Year: 40% x (C – F) = G — G

   (c) That the 40% entitlement remains due and payable by the Respondent to the State Government of Sabah for each consecutive financial year for the period from the year 1974 to the year 2021.

   (d) That a failure to pay the 40% entitlement by the Respondent to the State Government of Sabah for each consecutive financial year for the period from the year 1974 to the year 2021 is a breach of the fundamental right to property of the State Government of Sabah and

ultimately of the people of Sabah as enshrined under Article 13 of the Federal Constitution.

3. For the following Orders:

(a) An order of mandamus directed to the Respondent to hold another review with the State Government of Sabah under the provisions of Article 112D of the Federal Constitution to give effect to payment of the 40% entitlement under Article 112C read with subsection (1) of section 2 of Part IV of the Tenth Schedule of the Federal Constitution for each consecutive financial year for the period from the year 1974 to the year 2021 within 30 days and to reach a decision within 90 days from the date of this order.

(b) An order that the Respondent pays the entitlement as determined under paragraph 3 (a) above to the State Government of Sabah or as constitutional damages for breach of Article 13 of the Federal Constitution or both.

TEST IN A LEAVE APPLICATION

[13] Despite the extensive arguments made before the High Court and to us, we are mindful that the decision that is the subject of the appeal is the grant of leave to commence judicial review. The law is settled that the burden that an applicant must discharge to obtain leave is low regardless of the fact whether the application is heard inter parte or ex parte. The leave application is essentially a filter to weed out frivolous or wholly unmeritorious applications. We shall briefly refer to some oft quoted authorities on this point.

[14] In *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, the then Supreme Court, speaking through Ajaib Singh SCJ, said that the applicant only needs to show that the application is prima facie not frivolous or vexatious and there is some substance in the grounds to support it. The relevant passage is as follows:

> In his grounds of judgment the learned judicial commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of certiorari is made. The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had prima facie an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious.

[15] In *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298, Edgar Joseph Jr J (as he then was) observed that the test for leave to commence judicial review is as follows:

> I approach this application by reminding myself that under O 53 r 3, the court exercises discretion whether to grant leave to apply for judicial review. The court is here first looking only at the ex parte application and is concerned to see whether prima facie there is a genuine case for review.

[16] His Lordship then quoted with the approval the following passage from the speech of Lord Diplock at the House of Lords in *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd [on appeal from Reg v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd]* [1982] AC 617 at p 644 which drew a distinction between the duty of a judge of first instance at the leave stage and the full hearing stage. The passage from said judgment is as follows:

> If, on a quick perusal of the material then available, the court (that is the judge who first considers the application for leave) thinks that it discloses what might on further consideration turn out to be arguable case in favour of granting to the applicant the relief claimed, it ought in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion which the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

[17] Thus, the above eminent authorities and a host of other authorities which we have not referred to are all united in saying that the threshold test for a judicial review leave application is low. Leave is normally granted when the application is found not to be frivolous and justified argument in a full hearing. We shall now refer to three authorities that said that leave may be refused if the applicant has no locus standi or the subject matter of the judicial review application is non-justiciable. We shall make brief reference to these cases before moving on to discuss the main issues of locus standi and non-justiciability.

[18] In the *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927, leave to commence judicial review against a statutory body was refused by the High Court. The Court of Appeal in a majority decision reversed the High Court and granted leave. However, Gopal Sri Ram JCA (as he then was), speaking for the majority, also mentioned two situations in which leave may be refused. The relevant passage is as follows:

> To paraphrase in less elegant language what has been said in these cases, the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. *If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine*. So too will the court be entitled to refuse leave if it *is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable*, eg, proceedings in Parliament (see art 63 of the

Federal Constitution). (Emphasis added.)

[19] In the case of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164, the Court of Appeal in a unanimous decision, again speaking through Gopal Sri Ram JCA said that to justify a leave application to commence judicial review, the applicant need only satisfy what is known as 'threshold locus standi'. The passage in question from the said judgment is as follows:

> Historically speaking, the requirement of standing to approach a court for judicial review was one that was established by the courts to keep out litigants who had no legitimate grievance against the administrative arm of the State. The object was to prevent them from crossing the threshold of the courts of justice. *This requirement established by judges for themselves that only those with a legitimate grievance may cross the threshold and enter the court is what is known as 'threshold locus standi'. It is quite different from the doctrine of 'substantive locus standi', which falls to be determined by court at the very end of the case*, when it comes to decide whether on the facts and circumstances discretion ought to be exercised in the applicant's favour (see *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177). (Emphasis added.)

[20] On the test for leave, the last authority we shall cite is the Federal Court case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478, where Suriyadi Halim Omar FCJ, in the following passage, emphasised that the subject matter must in the first place, be amenable to judicial review for leave to be granted:

> Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. *A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged*. (Emphasis added.)

DECISION OF HIGH COURT

[21] The learned High Court judge found that the threshold for a leave application to commence judicial review was met by the SLS. His Lordship did not delve into the merits of the judicial review in depth as it was unnecessary at the leave stage. He dismissed the argument that the applicant has no locus standi or is otherwise a busybody. In respect of the argument that the subject matter is non-justiciable, the learned High Court judge said that the applicant is not asking the court to question to review the contents of the Review Order 2022. Rather, the applicant is seeking redress for breach of a constitutional duty owed to Sabah under the Federal Constitution. His Lordship held that this issue cannot be determined at the leave stage but should be argued at the substantive stage.

ISSUES IN THE APPEAL

[22] The AG raised four grounds of appeal in the supplementary memorandum of appeal. The first ground is that the High Court erred in concluding that the SLS has locus standi. The second ground is that the High Court erred in ruling that the relief sought by SLS was 'for public redress for breach of the constitutional duty to pay 40% entitlement' when the same is not amenable to judicial review. The third ground is the finding by the High Court that judicial review application instituted by the SLS is a 'public interest litigation'. The fourth ground is that the High Court erred in holding that the SLS is acting on behalf of the people of Sabah as only the Sabah Government can play that role.

[23] The said grounds centre around only two main issues that were also raised before the High Court and also argued before us via the written and oral submissions. The said issues are locus standi and justiciability of the subject matter of the judicial review application. The learned SFC did not address us at length on the merits of the judicial review application. As the decision of the High Court is only a leave application, we shall accordingly not deal with the substantive merits either. We have only adverted to the historical background and the relevant constitutional provisions to provide context for the judicial review application instituted by the SLS.

LOCUS STANDI

[24] The learned SFC strenuously argued before us that the SLS has no locus standi to institute the judicial review application. His grounds for this argument are as follows.

[25] Firstly, he cited O 53 r 2(4) of the Rules of Court 2012 that governs judicial review applications. The rule reads as follows:

> 2(4) Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application.

[26] The learned SFC submitted that there was no decision in this case to start with and therefore, the SLS has no locus standi to commence judicial review. However, the learned SFC did not elaborate on the significance of the Review Order 2022. We plainly find no merit in this argument as an 'omission' is also a decision under O 53 r 2(4) of the Rules of Court 2012. The argument of the SLS is that the Review Order 2022 purports to be an exercise of the review power under art 112D but no mention is made of the so-called 'Lost Years' between 1974 and 2022. Whether there is merit in this argument or not,

should be addressed in the substantive hearing. Be that as it may, prima facie, it cannot be said that the Review Order 2022 is not a 'decision' within the meaning of O 53 r 2(4) of the Rules of Court 2012.

[27] With respect, we find the two authorities cited by the learned SFC to support the argument that there is no 'decision' to be reviewed unhelpful. In the case of *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197, the purported decision was contained in a letter written by the appellant. The said letter merely informed the taxpayer of the initial findings of a field audit and invited the respondent to attend a meeting to discuss it. The Court of Appeal found that there is absolutely nothing in the letter that constituted a 'decision' and therefore in the absence of a decision, the respondent lacked locus standi to commence judicial review.

[28] The second case also involves the Inland Revenue Department. In *M & W Zander (M) Sdn Bhd v Director General of Inland Revenue* [2005] MLJU 669, the SFC objected to the leave application on the ground that there is no 'decision' as no notice of assessment was issued. The learned SFC also argued that even if such a notice was issued, the recourse under the law for an aggrieved taxpayer is to appeal to the Special Commissioners of Income Tax. For the reason that no decision was made to assess tax, the High Court refused the leave application. As we said earlier, both these authorities do not assist the court as the factual matrix in the instant case differs considerably. In the instant case, there is in existence the Review Order 2022 that purportedly did not account for the so-called 'Lost Years' and is therefore arguably 'an omission' that could come within the ambit of a decision.

[29] The second argument of the SFC on the locus standi point is that the SLS fails the 'adversely affected' test for locus standi. Three eminent authorities on the test for locus standi in judicial review applications were cited. We note that the same authorities were also cited by counsel for the SLS. The said authorities are *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor*, *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145, and *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829; [2023] 5 CLJ 167. We shall refer to these three eminent authorities as the trio of cases.

[30] Learned SFC argued that the SLS has no personal interest over the special grant. It follows that the SLS failed to establish that it had acquired a legal status or right against the Federal Government or Sabah Government which requires protection by a declaratory relief. The special grant is accorded to the Borneo States and therefore only the State Governments are the 'adversely affected parties' if there is any breach of art 112D. Therefore, the SLS is a 'stranger' who cannot show real and genuine interest in the subject matter

of the judicial review application. Learned SFC also submitted that this is not a public interest litigation.

[31] The argument of counsel for the SLS on locus standi may be summarized as follows. The correct application of the trio of landmark cases cited above, as opposed to the submission of the SFC, would result in the SLS being clothed with locus standi as found by the High Court. The said trio of cases liberalized legal standing to mount judicial review applications even if one does not seek personal redress for oneself but for the good of the public. Thus, in a public interest litigation, there is no requirement to establish infringement of a private right. Furthermore, the SLS is a body set up under statute to represent all advocates in Sabah. And s 13A of the Advocates Ordinance enjoins the SLS 'to uphold the cause of justice without regard to its own interests'. Thus, it is not a busybody and has a real and genuine interest in the subject matter of the judicial review.

[32] We note that the trio of cases was cited and quoted by the learned SFC in his discussion on locus standi. However, the learned SFC cited other cases on locus standi when he said that an applicant in a judicial review application 'must show that his personal right would be injured' by the alleged decision, action or omission of the respondent. For this proposition, the learned SFC cited *Karpal Singh Ram Singh v Ketua Hakim Negara* [2011] 4 CLJ 179. In respect of the mandamus relief, the learned SFC cited *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346; [1987] 2 CLJ 199 and submitted that the applicant 'must have specific legal right'.

[33] In the *QSR Brands* case, Gopal Sri Ram JCA noted that since O 53 of the Rules of High Court 1980 (now the Rules of Court 2012) was introduced in its present form, all remedies available under it, including declaratory and injunctive reliefs which previously were not available under it and the prerogative remedies such as mandamus and certiorari are all subject to the same threshold locus standi test of 'adversely affected'. However, His Lordship observed that the test calls for a 'flexible approach' and it is for the applicant to show where his case falls in the factual spectrum.

[34] By way of illustration, His Lordship said that at one end of the spectrum there would be cases when an applicant has obviously sufficient personal interest with respect to his life, liberty or property. At the other end of the spectrum, there would be cases where nexus between the applicant and the legality of the action under challenge would be so tenuous that the court may be entitled to disregard it as *de minimis*. The learned SFC only highlighted this illustration in his discussion of *QSR Brands* case and implied that SLS's

connection to the subject matter of the judicial review is too tenuous to be granted threshold locus standi.

[35] However, the learned SFC appears to have missed the import of the discussion in the *QSR Brands* case about the middle of the spectrum cases which concern public interest litigation. Counsel for the SLS had taken a position that the instant case is in the nature of a public interest litigation and it is for this reason that there is no requirement to show that the SLS's private right has been infringed and that it is seeking redress for itself. In the *QSR Brands* case, the Court of Appeal adopted the following test to determine whether an application is a public interest litigation. It is from the decision of the Supreme Court of India in *Malik Brothers v Narendra Dadhich and others* AIR 1999 SC 3211; (2000) 1 MLJ 67 (SC) which is as follows:

> Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

[36] In *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor*, the leave question before the Federal Court was as follows:

> Whether the test of locus standi propounded by the Supreme Court in *Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 ie that an applicant must establish infringement of a private right or the suffering of special damage still applies to application for judicial review, and to what extent, in light of the present O 53 r 2(4) of the Rules of the High Court 1980.

[37] The Federal Court answered the question in the negative and cited with approval the view expounded in the *QSR Brands* case in the following passage:

> In view of the foregoing we are of the view that the view expressed by the Court of Appeal in *QSR Brands Bhd v Suruhaniava Sekuriti & Anor* that the 'adversely affected' test was a single test for all the remedies provided for under O 53 of the RHC is to be preferred. Hence the answer to the question posed in this appeal has to be in the negative.

[38] In coming to this conclusion, Hasan Lah FCJ who delivered the judgment of the court, also quoted with approval the test for public interest litigation mentioned by the Court of Appeal in the *QSR Brands* case and

observed that the courts, both local and foreign, have recognised the need for the law to remain relevant to achieve the objective of the law. It is not necessary for an applicant to establish an infringement of a private law right or the suffering of special damage.

[39] In the recent landmark case of *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and Other Appeals*, the Federal Court had occasion to re-consider the locus standi issue in a judicial review application. The Federal Court, speaking through Nallini Pathmanathan FCJ, called for a broad, liberal and flexible approach to threshold locus standi in respect of public interest litigation in the following passage of the judgment:

> [441] It is also equally clear that in most jurisdictions this threshold issue has, and continues to evolve in manner that is consonant with a broad, liberal and flexible approach rather than the converse. This, in turn, is in keeping with the rule of law which requires that in order to maintain an equitable ordering between the citizenry and the government at various levels, the law must be relevant and effective in maintaining a check and balance for the ultimate benefit of the populace.

[40] Her Ladyship declared that the majority decision in *Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ 219 which is an originating summons action taken out for the benefit of the public is no longer good law as it was too restrictive with regard to locus standi.

[41] The leave question posed in *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and Other Appeals* in relation to locus standi was as follows:

> Whether O 53 r 2(4) of the Rules of Court is confined to the determination of threshold locus standi or whether it extends to confer substantive locus standi upon an applicant in an application for judicial review having regard to the decisions of the Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 and of the Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 and in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145?

[42] The question was answered as follows:

(a) O 53 r 2(4) relates to threshold locus standi. The reference to substantive locus standi is, effectively a reference to the substantive merits of the case, which allows the court to review its finding on threshold locus standi in view of the factual and legal matrix of the entirety of the matter;

(b) a person or entity may well fall within the broad approach to 'adversely affected' as envisaged under O 53 r 2(4) in the context of the particular area of law or statute dealing with the subject matter of a case, but yet

may not succeed on a substantive examination of the matter because when the entirety of the legal and factual matrix is analysed, he may not have met the requirements to warrant the grant of the various remedies available under judicial review; and

(c) the term 'adversely affected' is to be construed in the context of the legal and factual matrix within which the application is made, not *in vacuo*.

[43] In our view, the SLS has at the very least, established threshold locus standi in the instant case. The instant judicial review application, based on the discussion in the trio of cases, is clearly a public interest litigation taken for the benefit of a section of the public. It is not taken to seek redress for a personal wrong or grievance of the SLS. And the issue sought to be addressed in the judicial review application involves a matter of high constitutional importance no less. It is taken to purportedly vindicate a constitutional right accorded to the State of Sabah and therefore by extension, for the benefit of the people of Sabah.

[44] Whether there is merit in this application or otherwise, is a matter that should be addressed in the full hearing. It may well be that at the end of the full hearing, the High Court may review the finding of threshold locus standi and may not grant relief on substantive examination of the matter as stated in the answer to the leave question in the case of *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and Other Appeals* that we set out above. However, to shut out SLS from ventilating the issue on the ground of locus standi at this stage would definitely be a retrograde step and would not be consonant with the recent development of the law in this area. In the premises, with respect, we find no merit in the locus standi argument of the learned SFC.

JUSTICIABILITY

[45] We noted earlier that courts have expressed the view that if a matter is not justiciable, leave to commence judicial review may be refused. This was stated in the cases of *Tang Kwor Ham v Pengurusan Danaharta Nasional Bhd & Ors*, *QSR Brands* case and *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* that we cited earlier.

[46] The learned SFC submitted the subject matter of the judicial review application is not justiciable for the following reasons. The exercise of review under art 112D(2) of the Federal Constitution has to take into account the ability of the Federal Government and the needs of the Sabah Government as stated in the said clause. These involve policy matters which the court is not equipped to deal with. Furthermore, the review is between the Federal and State governments only. As for the special grant given in Review Order 2022, it was made by way of offer and acceptance. If the Federal Government and the

Sabah Government cannot reach an agreement as to the special grant under art 112D(6) of the Federal Constitution, the matter can be referred to an independent assessor. As non-legal considerations come into play, the matter is not suited for judicial determination.

[47] As to the meaning of justiciability, the learned SFC cited the decision of the Federal Court in the case of *Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo* [2014] 6 MLJ 812 where Suriyadi FCJ said as follows in respect of justiciability of a matter in a judicial review application:

> Justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. If the court has no authority to adjudicate over the dispute, then it is non-justiciable. This issue is recognised by courts and currently inherent in the nature of the judicial process (*Buttes Gas & Oil Co v Hammer* [1982] AC 888; *Kuwait Airways Corporation v Iraqi Airways Co* [2002] UKHL 19).

[48] The learned SFC also submitted on the authority of the Federal Court case of *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 that the justiciability can be decided at the leave stage if there are sufficient material before the court.

[49] Counsel for the SLS argued that the issues for determination are legal issues that do not require policy considerations involving broad discretion that the court is institutionally ill-equipped to handle. He argued that SLS is not challenging the special grant given in the Review Order 1970 or 2022 but only urging the court to rule on the omission of the 'Lost Years' which is a matter of constitutional interpretation.

[50] In our view, at this stage, it cannot be said that the subject matter of the judicial review application is not justiciable. Counsel for the SLS pointed out that in the prayers of the judicial review application, the SLS is not challenging the lawfulness of the special grant. If that were the case, it would immediately attract the justiciability argument as it is a matter agreed by the Federal Government and the Sabah Government. Neither is the SLS asking the court to conduct a review under art 112D. A prayer to that effect would also attract the justiciability argument as the court is not equipped to handle such a matter. The overarching focus of the judicial review application, is the alleged omission in the Review Order 2022 to account for the missing 'Lost Years'. The learned High Court judge thought that this is a matter of interpretation to be decided in a full hearing and we find that we cannot disagree with him. The relevant passage of His Lordship's judgment is as follows:

> [29] The applicant's relief here is for public redress for breach of the first respondent's public duty, a constitutional duty to pay 40% entitlement for each consecutive financial from the year 1974 to 2022. This issue is to not be determined

A at this leave stage as it involves arguments pertaining to the interpretation of the articles of the Federal Constitution on the special grant.

[51] For the above reasons, we are not persuaded that the matter is prima facie not justiciable.

B

CONCLUSION

[52] In conclusion, we note that the two main issues raised by the learned SFC lack merit given the factual and legal matrix of this unprecedented judicial C review application. In the premises, we unanimously dismiss the appeal. If this matter is not taken up further by the appellant, we direct the High Court to fix a date for the full hearing of the judicial review application. No order as to costs.

D *Appeal dismissed; court directed High Court to fix a date for full hearing of judicial review; no order as to costs.*

Reported by Dzulqarnain bin Ab Fatar

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